IN THE HIGH COURT OF JUDICATURE OF BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 276 OF 1997

M/s.Gannon Dunkerley & Co.Ltd.
Chartered Bank Building
2nd floor,
Mahatma Gandhi Road,
Mumbai - 400 023. ..Petitioner

versus

1. Mr.G.S. Baj,
Member, Industrial Court,

2. Mr. R.Rajamani Ponnalah
C/o Indian Labour Orgnisation
5, Gopal Niwas, 275,
Sion-Matunga Road,
Sion (East),
Mumbai - 400 072. ..Respondents

Mr.R.V. Paranjape with Mr.S.D. Puri for the petitioner.

Smt.Shobhana Gopal for the respondent no.2.

CORAM : B.H. MARLAPALLE,J.

DATED : 20th & 21st October 2005.

ORAL JUDGMENT:

1. This petition takes exception to the judgement and order dated 3rd October 1996 rendered by the Learned Member of the Industrial Court at

Mumbai to Complaint (ULP) no.577 of 1987. The petitioner employer has been held to be guilty of engaging in unfair labour practices under items 6 and 9 of Schedule IV of the MRTU & PULP Act 1971 (for short 'the Act') and in addition, the petitioner was directed to reinstate the complainant in service with full back wages and continuity from 22nd March 2004. Further, the petitioner was directed to extend the benefits and privileges of permanency to the complainant in the post of clerk in "C" Grade with effect from the date he completed 240 days continuous service from 22nd March 1984 as well as the benefits of Bilgrami award.

2. The petitioner is a public limited company with its registered office at Mumbai and it has various divisions. It claims to have establishments all over the country. At the relevant time, it was mainly engaged in supply of textile machinery and civil construction. In addition to a factory, it had three godowns/warehouses at Mumbai i.e. one each at Byculla, Sewree and Mazgaon. The plaintiff who

possessed the qualifications of B.A. claimed that he was appointed in August 1978 as a clerk. He was being paid on vouchers, no attendance record was maintained and the benefits available to regular employees were denied to him. He therefore, approached the Industrial Court and filed Complaint (ULP) No.577 of 1987 on or about 17th June 1987 under items 6 and 9 of Schedule IV of the Act and prayed for directions to regularise in the employment of the company and place in clerk grade - B with the benefits of Dearness Allowance etc. under the S.T. Bilgrami award dated 19th September 1966. Pending the complaint, he had prayed for interim relief directing the Company not to remove him from service during the pendency of the complaint by filing an application u/s.30(2) of the Act. The said application came to be rejected by the Industrial Court on 30th June 1987 and consequently he was discontinued.

3. The complainant therefore sought amendments to the complaint by submitting an amendment

application on or about 8th September 1994 (Exhibit U-11) and it was allowed by the learned Member of the Industrial Court by his order dated 15th February 1995. On account of the amendment being allowed, relief of reinstatement was prayed for as a consequential additional relief in the complaint pending before the Industrial Court.

4. The learned counsel for the petitioner raised two preliminary grounds viz.(a) the amendment sought in the complaint was belated and the learned Member of the Industrial Court had left this issue open for being decided while deciding the complaint but failed to do so and (b) the complaint on amendment was not maintainable before the Industrial Court and the relief of reinstatement could be agitated only before the Labour Court under item 1 of schedule IV of the Act.

. The learned counsel further submitted that in a complaint under items 6 and 9 of Schedule IV of

the Act, a complaint for reinstatement could not be entertained and the complainant would have either withdrawn the complaint from the Industrial Court and filed a fresh complaint before the Labour Court or prayed before the Industrial Court to transfer the complaint to the Labour Court. Reliance has been placed on the following decisions of this Court on the point that the complaint was not maintainable.

i) Dilip son of Indrabhanji Vs. Industrial Court, Nagpur reported in 1995 - II CLR 1.

ii) Hindustan Lever Ltd. vs. Hindustan Lever Mazdoor Sabha & Ors. reported in 1996 II CLR 102.

iii) Pepsico India Holdings Pvt.Ltd. Vs. Naushir Elavia reported in 2002 I CLR 953.

5. The learned counsel further submitted that the warehouse was a separate establishment and the

model standing orders were not applicable. The complainant was employed on contract basis initially in August 1978 and he had left his tenured appointed sometimes in August 1988 and he submitted his resignation letter dated 21st October 1982. The complainant re-approached the management for employment and accordingly, an appointment order of contract was issued on 22nd March 1984. As per the petitioner, the complainant was continued on such contractual terms and his last tenure expired on 30th June 1987 and therefore, there was no termination of his services by the employer. On the other hand, it was a case of non renewal of contract of service on expiry of its tenure on 30th June 1987. It was lastly contended that the Bilgrami award was not applicable to the employees engaged on contract basis and it was applicable only to the employees on permanent rolls of the Company. It is also claimed that the said award was applicable to only 123 employees and not to any other employees of the Company.

6. The learned counsel for the complainant has opposed the petition and supported the impugned order passed by the Industrial Court. This petition was admitted on 9th April 1997 and by the subsequent order dated 10th September 1997, the petitioner was directed to deposit Rs.1.15 lakhs with the Registry and this amount has been deposited. In response, the respondent employee has contended that he had attained the status of permanent employee more so because he was performing the duties of a clerk at the warehouse and the said work was perennial and employees on permanent rolls were also engaged to perform such duties. He has approached the management from time to time to extend the benefits of permanency but there was no response and therefore, he had approached the Industrial Court for regularisation of a permanent employee. In support of the complaint, the complainant himself examined as UW No.1 and on behalf of the management, Mr.Krishnakumar Trivedi was examined at Exhibit C-15. The Industrial Court framed the following two issues (a) whether the complaint was barred by limitation? and (b) Does the complainant prove that the

respondent had engaged in any unfair labour practice under items 6 and 9 of Schedule IV of the Act?

6A. By considering the evidence adduced by both the parties and the arguments advanced, the Industrial Court held that the complaint was not barred by limitation and the complainant had proved that the employer had engaged in unfair labour practice within the meaning of items 6 and 9 of Schedule IV of the Act. Consequently, he was directed to be reinstated as a permanent employee. The submissions of the management that the discontinuation of the complainant from employment was covered by the exceptional clause viz. section 2(oo)(bb) of the Industrial Disputes Act 1947 (for short 'the Act')

7. The Industrial Court also accepted the case of the employer that pursuant to the resignation submitted by the complainant on 22nd October 1982, he was not in the employment of the management till he

was re-appointed as per the appointment order dated 22nd March 1984. This finding of the Industrial Court is also supported by the testimony of the complainant himself. In his cross-examination before the Industrial Court, he admitted that during this intervening period from October 1982 to March 1984, he worked with M/s. Sharda Trading and Ram Trading Companies. He also agreed that there was no concern whatsoever between these two companies and the employer company. This finding of the Industrial Court has gone unchallenged and therefore, the complainant's case of permanency and all other consequential benefits will have to be examined on the basis of the appointment orders issued on 22nd March 1984 onwards and not from August 1978. The appointment order dated 22nd March 1984 which was in response to the application dated 20th March 1984 submitted by the complainant stated that he was appointed on contract basis for the warehouse work on a consolidated salary of Rs.675/- p.m. and for a period of six months with effect from 22nd march 1984, subject however to further renewals at the option of the Company. By the next communication

dated 22nd September 1984, the Company informed the complainant that his contract was extended by six months from 22nd September 1984 and on the same monthly salary. By another letter dated 22nd March 1985, his contract was extended by six months. Similar extension letters were issued on 22nd September 1985, 1st January 1986, 1st July 1986 and 1st January 1987. On 30th June 1987, another letter came to be issued informing the complainant that his contract of employment had expired on that date by efflux of time and the same could not be renewed and accordingly, his contract tenure came to an end on 30th June 1987 after the closing hours. The Industrial Court recorded a finding that the complainant was in continuous service from 20th March 1984 to 13th June 1987 i.e. for more than three years and this finding has not been disputed except to state that it was an employment on contract and therefore, the complainant was not entitled to claim permanency in employment nor was it necessary for the Company to comply with the mandatory provisions of section 25-F of the I.D. Act, during the pendency of the complaint.

8. When the complainant approached the Industrial Court by filing the complaint under items 6 and 9 of the Schedule IV of the Act, the relief sought for was for directions to regularise his service and extend him the benefits of permanent employee. By way of interim relief, he had prayed for protection viz. an interim order directing the employer not to discontinue him during the pendency of the complaint but the Industrial Court was pleased to reject the application for interim relief and on the same day, the Management issued the letters informing him that his contract services came to an end by efflux of time. He rightly applied for amendment of the complaint but this application was submitted belatedly. It was originally not a complaint challenging an order of termination/discontinuation/discharge/dismissal and the relief of reinstatement prayed for subsequently arose at the instance of the employer and during the pendency of the complaint. It was necessary to examine his status in the employment of the Company

and if he was successful in proving that his claim of permanency was required to be upheld, the consequential order of reinstatement would follow and more so when the Industrial Court had turned down his interim application for protection. On these obtaining circumstances, the decisions of this court as relied by the learned counsel for the petitioner and referred to hereinabove, are not applicable.

9. So far as the issue of limitation is concerned, section 28(1) of the Act requires the complaint to be filed within 90 days of the occurrence of the alleged unfair labour practice. However, proviso thereunder empowers the Court to entertain a complaint after the period of 90 days if good and sufficient reasons are shown by the complainant for filing the complaint belatedly. In the instant case, initially the complaint was not hit by limitation as the relief sought was for permanency which arose from a continuous cause of denial of such relief. The complainant applied for amendment after about 7 years from the date of his discontinuation of

service but this belated action could not be the reason to hold that the complaint itself was hit by limitation. The learned counsel for the petitioner referred to the order dated 15th February 1995 passed by the Industrial Court allowing the amendment application wherein the respondent employer was granted liberty to urge the point of limitation as the preliminary issue if at all so desired. Though the Industrial Court framed the above referred two issues, there is nothing on record to show that the employer applied for framing the issue of limitation as a preliminary issue and therefore, the employer was estopped from raising the issue of limitation now in this petition. Obviously, the employer gave up the same issue of limitation.

10. The complainant was in employment continuously from 21/3/1984 as a Clerk and posted at the warehouse in Byculla and he was performing the duties of permanent nature. He was entitled to be made permanent on completion of 240 days of service under the Model Standing Orders applicable to the

petitioner-company. The Company had committed breach of the Model Standing Orders by denying the status and privileges of a permanent employee to the complainant and he had been continued as casual or temporary for years together with an object of depriving him of such status thus making out a case of unfair labour practice under Item 6 of Schedule IV of the Act.

10A. He pointed out that the service conditions of the permanent employees were governed by two different awards i.e. Award dated 19/3/1966 and 9/11/1976. As per the first award there were three grades of Clerks as under:-

(a) Grade-C Rs.80-5-100-7.50-130-10-160-12-220.

(b) Grade-B Rs.120-12-180-15-270.

(c) Grade-A Rs.175-15-250-20-390.

As per the complainant he being a graduate in Arts, he was entitled to be absorbed as a permanent Clerk in Grade-B and the failure to do so amounted to an act of unfair labour practice under Item 9 of Schedule IV of the Act. The complainant emphatically stated that the provisions of the Model Standing Orders framed by the Government of Maharashtra under the Industrial Employment (Standing Orders) Act, 1946 were applicable to the Company and as he had put in uninterrupted service for more than 240 days in a year, he was entitled to be absorbed as the permanent Clerk in the employment of the Company. He also stated that he was performing the work of permanent in nature for years together. As per the Company the complainant was not entitled to claim permanency in the post of a Clerk and in any case after 30/6/1987 as the contract was not renewed. It was sought to be argued that the godown/warehouse at Byculla is an independent establishment and it did not employ 50 or more than 50 employees at any time and, therefore, the provisions of Model Standing Orders were not

applicable to the warehouse at Byculla. This defence is frivolous. There is no evidence brought on record in support of the claim of the Company that the three warehouses in Mumbai were separate legal entities with a distinct legal existence separate from the Company i.e. the Gammon Dunkerley & Co. Ltd. On the other hand the award dated 19/9/1966 passed by the Industrial Tribunal of Maharashtra at Mumbai (presided over by Shri S.T. Bilgrami) clearly showed that two references governed by the said award were between the Gannon Dunkerley and Co. Ltd., Bombay and the Workmen (clerical staff, peons, drivers, mazdoors etc.) employed under it in its Head Office and Godowns at Mumbai and the references were decided together as they were against the same Company and by the same employees. This award falsifies the claim of the Company that the warehouse at Byculla where the complainant was working as a Clerk was a separate legal establishment and, therefore, it was not governed by the Model Standing Orders. It was necessary for the employer to adduce evidence and prove that the provisions of Model Standing Orders were not applicable to the warehouse at Byculla more

so when the complainant had based his claim on the contentions that he was entitled for the benefit of permanency under Clause 4-C of the Model Standing Orders as applicable to the Company and he claimed to be the employee of the Company. No where in the written statement filed before the Industrial Court the Company disputed the complainant's status as its appointee. On the other hand, the Company all along went on to state that it had appointed him on contractual basis.

11. The Government of Maharashtra has framed Model Standing Orders below Schedule - I to the Bombay Industrial Employment (Standing Orders) Rules 1959 and there is a separate set of Model Standing Orders for workmen employed on clerical or supervisory work. Section 1(3) of the Industrial Employment (Standing Orders) Act 1946 states that it applies to every industrial establishment wherein 50 or more workmen are employed. There is no dispute that the total employment of the petitioner- Company at the relevant time was more than 50 in the category

of workmen and there is no evidence brought on record by the Company to show that its total employment strength was less than 50. Clause 4-B of the Model Standing Orders applicable to the clerical and supervisory employees states that a temporary workman who has put in 190 days' uninterrupted service in the aggregate in any establishment of a seasonal nature or 240 days, uninterrupted service in the aggregate in any other establishment, during a period of preceding twelve calendar months, shall be made permanent in that establishment by an order in writing signed by the Manager, or any person authorised in that behalf by the Manager, irrespective of whether or not his name is on the muster roll of the establishment throughout the period of the said twelve calendar months. Under Clause 3 of the Model Standing Orders the workmen are classified in four categories, namely, (a) permanent workmen, (b) probationers, (c) temporary workmen and (d) part-time workmen. A "permanent workman" means a workman who has been employed on a permanent basis or who, having been employed on a temporary basis has subsequently been made permanent by an order in

writing by the Manager or any person authorised by him in that behalf and includes the apprentice who is asked or appointed to work in the post or vacancy of a permanent workman for the purpose of payment of wages to him, during the period, he works on such post or in such vacancy. A "probationer" means a workman who is provisionally employed to fill a permanent vacancy or post and who has not completed three months' a uninterrupted service in the aggregate in a clerical or supervisory post in the establishment. Whereas a "temporary workman" means a workman who has been appointed for a limited period for work which is of an essentially temporary nature, or who is employed temporarily as an additional workman in connection with temporary increase in work of a permanent nature and includes a workman who is appointed in a temporary vacancy of a permanent workman or probationer. It is thus clear that the Standing Orders do not envisage any clerical or supervisory appointment to be made on contract basis. Appointments are made as permanent, probationer, temporary or part-time. There can be no doubt that in the categories of clerical or supervisory,

appointments can be from the categories recognized under the Model Standing Orders. A contract of employment between a workman and his employer is not envisaged under the Model Standing Orders setting out a contractual tenure of few months or years save and except of temporary appointee. If a temporary workman is continued uninterruptedly for a period of 240 days in a year he is entitled for being made permanent. A probationer is appointed for three months and subsequently either he is confirmed as a permanent employee or discontinued on account of unsatisfactory performance in work or for some other related reasons making him unfit to be continued beyond three months. The status of the complainant as claimed by the petitioner-company is unknown to the Model Standing Orders and this defence of the status has been taken by the Company by way of an after thought only to defeat the claim of the complainant. The appointment letters issued to the complainant by the Company from time to time from 21/3/1984 will have to be held as appointment letters on temporary basis and as he continued for more than three and half years without breaks and during every

year he completed more than 240 days of continuous service within the meaning of Section 25-B of the I.D. Act or the explanation below Clause 4-B of the Model Standing Orders, he was entitled to be made permanent. As far as the nature of his duties is concerned, the sole witness of the Company who stepped in the witness box before the Industrial Court i.e. Mr. Krishnakumar Pramodkumar Trivedi examined at Exh.C-15 admitted in his cross-examination that, (a) there were about 100 and 150 workmen working in the factory in the year 1971, (b) it was true that the nature of work being done by the complainant was the same and similar as done by himself in the warehouse, (c) the award of 1966 was confirmed by the Supreme Court for 123 workmen, (d) Shri Chandrashekhar and Shri Mishra who were continued in the service of the Company as permanent workmen were doing the same kind of work which the complainant was doing. He also admitted that Mr.Chandrashekhar was made permanent in September 1988 and in the month of November, 1988 one Shri Devishankar Mishra was made permanent. This evidence fully supported the claim of the complainant that he

was required to be made permanent on completion of 240 days of service from 21/3/1984 and the Industrial Court in the impugned Judgment rightly granted the said relief, more so because the complainant was successful in proving that the employer was guilty of unfair labour practice under Items 6 and 9 of Schedule IV of the Act by denying him the benefits of permanency.

12. As far as the relief of reinstatement is concerned, as noted earlier, it was a consequential relief and during the pendency of the complaint the Company issued a letter dated 30/6/1987 to the complainant stating that his contract came to an end. As the complainant has been held to be entitled for permanency on completion of 240 days service from 21/3/1984, this communication dated 30/6/1987 would not stand the test of law and it would amount to discharge simpliciter which is not permissible unless it was an act of retrenchment by following the mandatory requirements of Section 25-F of the I.D. Act. Termination of the employment of a permanent

employee/workman is recognized as legal if it is effected by following the provisions of the Model Standing Orders or the employee retires on superannuation, apart from termination by retrenchment. The Industrial Court, therefore, rightly directed the Company to reinstate the complainant in service. So far as the benefits of Bilgrami award are concerned the learned counsel for the petitioner-Company referred to the order passed by the Apex Court in Civil Appeal No.1002 of 1980. This order does not come in the way of the complainant from receiving the benefits of the award dated 19/9/1966 and the names of 123 workmen were not brought before the Industrial Court by the Company so as to prove that the clerical categories were not covered by the said award or the complainant himself was excluded from the list of 123 workmen. The arguments thus advanced on the basis of the order passed by the Apex Court have to be rejected.

13. For the reasons enumerated hereinabove, there is no case made out to interfere with the

impugned order by exercising the supervisory powers under Article 227 of the Constitution of India.

. In the premises, this petition fails and the same is hereby dismissed. Rule discharged. The deposited amount with interest accrued thereon, if any, be refunded to the respondent-workman.

14. At this stage, the learned counsel for the petitioner-Company submitted an oral application for stay to this order. The application is hereby rejected.

(B.H. Marlapalle,J.)